IN THE

Supreme Court of the United States

October Term, 1954

No. 203

FRANK LEWIS, *Petitioner*

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

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The United States by revising the "Questions Presented" as set forth in the Petitioner's main brief at pages 2-3 has endeavored to divert this Court's attention from the most important argument advanced by the petitioner in his main brief. That argument is that the 10% tax provision of the Wagering Tax Act (Sec. 3285, Title 26 U.S.C.) is of itself unconstitutional for several reasons when sought to be applied in the District of Columbia and, therefore, this petitioner was not required to pay the $50 tax and register pursuant to the provisions of the Wagering Tax Act (Secs. 3290-3291, Title 26 U.S.C.) since liability for the 10% tax is a sine qua non for liability for the $50 tax. By its revision of the "Questions Presented", particularly question

, page 2 of its brief, the United States would have this 'ourt believe that this petitioner's only objection to the ayment of the $50 tax is that such a payment in the Dis- rict of Columbia would tend to incriminate him of viola- ions of Federal law. While it is true that this is one of he arguments advanced by the petitioner in his main brief, t is neither the only argument nor the most important one. The most important question for this Court to decide s whether or not the 10% tax is invalid as applied to per- ons in the District of Columbia for if it is invalid then his petitioner was under no obligation to pay the $50 tax. The United States has deliberately evaded any discussion f the validity of the 10% tax section. But in so doing, the Jnited States has made a fatal admission. At page 8 of ts Brief the United States states:

> ". . . It is apparent from an integrated reading of the statute that the $50 occupational tax is payable prospectively and before any wager is negotiated, *while the 10% tax is retrospective, and is levied on the gains of past activities . . .*" (Emphasis supplied)

The fact that the 10% tax is retrospective and is levied n the gains of past activities is the reason that the 10% ax is unconstitutional and not valid as applied to this peti- ioner in the District of Columbia. All of the arguments dvanced by the United States in its attempt to sustain the alidity of the $50 tax without reference to the 10% tax re predicated on its interpretation of the Wagering Tax ct whereby it concludes that the $50 tax is valid because t must be paid before any wager is accepted or, in other ords, before any Federal crime committed. This endeavor o put a distorted construction on the $50 tax section is to void the obvious conclusion that if the $50 tax is not owing nd due until after the acceptance of a wager, its payment nd registration would tend to incriminate this petitioner n the District of Columbia and further would also constitute penalty in the guise of a tax. It is this same rationale,

however, which compels the conclusion that the 10% tax is unconstitutional as applied in the District of Columbia as it pertains only to *past activities*, that is to say it applies only to wagers which have been accepted. Therefore, to compel the filing of Form 730 (Main Brief, pages 45-46) would contravene the provisions of the Fifth Amendment for that Form would compel a confession of the commission of Federal crimes in the District of Columbia, to wit, that wagers had been accepted in violation of Federal law prohibiting the acceptance of wagers. Further, since the 10% tax applies only to past activities which are wholly prohibited by Federal law in the District of Columbia (Footnote 1, petitioner's main brief) the 10% tax is in fact a penalty in the guise of a tax and not a true tax. Since therefore this petitioner was not subject to the 10% tax, he was not obligated to pay the $50 tax.

In its endeavor to advance some argument in contravention of this petitioner's contentions, the United States has indulged in the most puerile reasoning at page 7 of its brief wherein it states:

> "No one forced petitioner to engage in the wagering business. When he elected to remain in the business he did so with full knowledge that the Federal Government had imposed a tax on this occupation. He could not elect to remain in the business and reject the tax burdens which Congress had placed upon it. . . ."

The absurdity of this argument is manifest at a moment's reflection. If this argument is valid it would apply to all other activities which are prohibited by Federal law. For example, no one is forced to engage in robbing banks, robbing the mails, transporting stolen motor vehicles in interstate commerce and the like. But even a layman would instantly realize that persons who have committed such Federal crimes could not legally be required to file a report with the Federal Government stating that such Federal crimes had been committed and be required to pay excise taxes for engaging in such wholly prohibited activities. Seeking some

legalistic support for the foregoing absurd contention, the United States at page 7 of its brief quotes from 8 Wigmore, as follows:

> "[T]here is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in future be criminal at the choice of the party reporting."

But the foregoing language has no application in the instant case. First of all Form 730 which must be filed monthly contemporaneously with the payment of the 10% tax is not a future report on future acts. It is a report as to past acts and does compel self-incrimination in contravention of the Fifth Amendment. Further, even assuming arguendo that liability for the 10% tax is not the sine qua non for liability for the $50 tax and that payment of the $50 tax and registration must precede engaging in the business of accepting wagers, the registration statement required to be filed by the Wagering Tax Act, is itself not a future report on a class of future acts, among which a particular one may or may not in the future be criminal at the choice of the party reporting. Even under the foregoing premise such a registration statement would be a future report on a class of acts all of which are crimes under Federal law in the District of Columbia as the party reporting has no choice as to whether or not the acceptance of wagers is or is not criminal. Nor do the *Shapiro* and *Davis* cases cited by the United States in its Brief at page 11 in any wise support the United States' contentions. In those cases the records which were required to be kept were records as to activities which had not been made illegal under any Federal law and it was only because of malfeasance by the parties concerned in the operation of the activities and the keeping of the required records that any crime was committed. Further, such persons were not required to file monthly reports confessing their crimes nor were they required to pay penal-

ties in the guise of excise taxes on their activities. To the contrary in the instant case where the activities which are sought to be taxed are wholly prohibited.

At page 9 of its Brief in footnote 2 the United States endeavors to support its contention that payment of the $50 tax and registration contemporaneous therewith must precede the acceptance of wagers by citing Section 3271, Title 26, U.S.C. and Treasury Regulation 132, Section 325.50. But as this petitioner pointed out in his main brief (page 13) and as is clear from a reading of Treasury Regulation 132, Section 325.42 (Petitioner's main brief, page 39), the words "commencing business" as used in Section 3271, supra, mean "The initial acceptance of a wager by a person liable for the 10% tax. . . ." In other words a person has not "commenced business" until he has accepted at least one wager. Therefore, under Subsection (b) of Section 3271, supra, the special $50 tax cannot be owing and due until the acceptance of at least one wager and its payment cannot be compelled until that time. Thus, the payment of the $50 tax after the acceptance of initial wager would constitute the payment of the special tax *in the manner provided in the chapter.* However, compelling the filing of a statement admitting that a wager had been accepted would contravene the Fifth Amendment and would also render the tax invalid in that it would be a penalty in the guise of a tax. Further reference should be made to Treasury Regulation 132, Section 325.50 cited by the United States in footnote 2 at page 9 of its brief. This section in substance provides that no one shall engage in the business of accepting wagers *subject to the 10% excise tax,* until he has filed a return and paid the special $50 tax. However, it should be noted that the Bureau of Internal Revenue necessarily limits this requirement to those *subject to the 10% excise tax.* But as has been pointed out hereinbefore in this brief and in petitioner's main brief, this petitioner is not and will not be subject to the 10% tax. Also, at the time that the Bureau of Internal Revenue amended Section 325.50 it also

released a Press Release explaining this amended regulation. That release provides in part as follows:

> "The Commissioner in a Press Release dated August 29, 1952, explained the amended regulations at ¶ 42,812 as follows:
>
> "Tighter regulations for the enforcement of the wagering tax law will go into effect Monday, September 1, Commissioner Dunlap announced today.
>
> "Under the new rules, gamblers who are liable for the $50 special Federal occupational tax must purchase their stamps before engaging in any taxable wagering activity. *Previous regulations allowed bookmakers, policy operators, their agents and employees until the end of the month in which they first commenced business to purchase the wagering occupational stamp.*
>
> "Commissioner Dunlap said that the old regulations, which have been in effect since November 1, 1951, caused difficulties in the enforcement of the stamp tax. *When gamblers and their agents were arrested by local authorities their defense usually was that they had just commenced business. In the absence of proof to the contrary, no Federal prosecution could be undertaken if the arrested person paid the special wagering tax before the end of the month in which he was arrested.* The new regulations, which become effective on Monday, provide that anyone in the business of taking taxable wagers for his own account or for the account of another person will be liable to prosecution if he does not have a wagering stamp at the time he accepts a bet.
>
> "A new occupational stamp must be purchased on or before July 1 of each year that the wagering business continues.
>
> "The new rule is expected to assist the Bureau of Internal Revenue in its task of collecting the 10 per cent excise tax on wagers placed with bookmakers, policy operators, and persons conducting lotteries." (Emphasis supplied)

Contrary to the assertion of the United States in its brief (footnote 2, page 9) that Section 3271, supra, has been administratively clarified by the Bureau of Internal Reve-

nue by this amendment, namely, Section 325.50, it is obvious from the foregoing press release that this amendment was not in fact a clarification of Section 3271, supra. Prior to August 29, 1952 and at the time this petitioner was charged, the regulation had provided for many months that the $50 tax must be paid on the last day of the month during which the business had been commenced. (Petitioner's main brief, page 39, Sec. 325.50) This was a proper construction of Section 3271 and of the provisions of the Wagering Tax Act, but since the payment of the $50 tax and registration was not required *until after* the commission of a Federal crime, such a requirement contravened the Fifth Amendment and imposes a penalty in the guise of a tax. The amended regulation has no foundation either in Section 3271, supra, or the provisions of the Wagering Tax Act for its validity. It is an endeavor on the part of the Bureau of Internal Revenue to legislate rather than interpret. Having no foundation in the organic act it is meaningless. The truth of the matter as is evidenced from the press release referred to hereinbefore is that the Bureau of Internal Revenue was interested in doing one of two things, namely, either endeavoring to aid local authorities to more effectively apprehend would be violators of state gambling statutes or lighten what it envisioned its burden at that time in apprehending gamblers who, when caught, could come in on the last day of that month and pay their taxes and the United States thereby possibly lose taxes for preceding months. Neither reason renders the amended regulation valid.

The United States at page 8 of its brief states:

> ". . . What he is in effect arguing is that Congress cannot tax an illegal business because payment of the tax would reveal the illegality. This Court has consistently rejected such an argument. *Sonzinsky* v. *United States*, 300 U.S. 506; *United States* v. *Sanchez*, 340 U.S. 42; *United States* v. *Constantine*, 206 U.S. 287, 293."

It is asserted that none of the cases cited support the statement of the United States. As is pointed out in the petitioner's main brief (pages 17-20), this Court has never held valid a federal tax which is imposed on an activity which is wholly illegal under federal law to the fullest extent to which the Congress of the United States could legislate. The activities taxed in *Sonzinsky* and *Sanchez* cases were not illegal under any Federal law provided that the persons complied with the provisions of the laws. To the contrary in the instant case. Further, in the *Constantine* case, supra, this Court held that a tax which is imposed on an activity which is wholly illegal *only under state law* was not valid.

The United States at page 6 would have this Court believe that the petitioner's main brief was the first time that he advanced the argument that certain provisions of the Wagering Tax Act contravene the Fourth Amendment. This is not the fact. This argument was advanced orally in the court of first instance as was stated in petitioner's main brief at page 6 and as is evidenced from the opinion of the court of first instance (R-27). The argument advanced by the United States that the provisions of Chapter 27A do not contravene the Fourth Amendment is fully rebutted by the petitioner's main brief (pages 20-22).

WHEREFORE, this petitioner again prays this Court that a Writ of Certiorari be granted because of the serious constitutional questions presented and the importance of these questions in the administration of Federal law generally.

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